

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON
JUNE 1995 SESSION

FILED
February 29, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE)
)
 Appellee,)
V.)
)
JOHN EISOM,)
)
 Appellant.)

C.C.A. NO. 02C01-9501-CC-00003
Lauderdale County Circuit No. 5990
Hon. Joe H. Walker, Judge
(Second Degree Murder, and Aggravated
Assault) (2 counts)

FOR THE APPELLANT:

Julie K. Pillow
Assistant Public Defender
P.O. Box 700
Somerville, Tennessee 38068

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Michelle L. Lehmann
Counsel for the State
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

William Randolph
Assistant Attorney General
302 Market Street
Somerville, Tennessee 38068

OPINION FILED: _____

AFFIRMED

MARY BETH LEIBOWITZ,
Special Judge

OPINION

This is an appeal as of right by the Appellant John Eisom, from a judgment of the Lauderdale County Criminal Court approving a jury verdict finding him guilty of second degree murder and two counts of aggravated assault.

The Appellant presents three (3) issues for consideration on appeal.

First, he contends that the trial court erred in sentencing him to an enhanced punishment within the sentencing range on the second degree murder conviction based upon the facts and circumstances. The court sentenced the Defendant to twenty (20) years in prison as a Range I, Standard Offender, on the second degree murder, and to three (3) years on each aggravated assault concurrently.

Second, he contends that the trial court erred in overruling the Defendant's objection to the relevance of witness Jerome Eisom's testimony.

Third, he contends that the evidence presented at trial was insufficient to support the verdict and judgment of guilty for the offense of aggravated assault of the victim, James Currie.

We affirm the judgment of the trial court.

On November 20, 1993, the Defendant attended a party for Bobby Harrell, at the Harrell home. He knowingly brought a loaded gun to the party, and advised another individual that he would shoot anyone who messed with him.

The Defendant and his cousin, Jody Eisom, were asked to leave the party because they were smoking marijuana. Shortly after they left, the Defendant and Jody Eisom returned to the party and a fight ensued as they entered the utility room of the house. This fight involved a considerable number of people including James Currie, Simmie Rice, Lynell Rice, and the Defendant. The Defendant was struck after he came to the defense of his cousin Jody Eisom. The Defendant then pulled out his gun and fired several shots, the first one at James Currie, which shot missed James Currie, but hit Simmie Rice. James Currie then hit the Defendant with a flashlight in order to stop the Defendant and dove into the living room to get out of the Defendant's line of fire. When he turned around, James Currie saw the Defendant extend his arm and fire two or three shots at Lynell Rice, who was also trying to get out of the line of fire. Lynell Rice died as a result of a gunshot wound. Lynell Rice was fifteen (15) years of age. The Defendant fired a total of four (4) shots and ran away, and had cuts on his forehead that required

sixteen to twenty stitches. The Defendant requested that his relatives hide the gun and they did so. The victim, Simmie Rice, survived his injury, and James Currie, the third victim, received no injuries as a result of this fight.

The first issue that we consider is whether the trial court erred in sentencing the Defendant to an enhanced punishment within the sentencing range. The Defendant received a sentence in the middle of the range as a Range One, Standard Offender for second degree murder, and two concurrent minimum sentences for aggravated assault. The Defendant urges that the trial court did not follow the statutory mandate to start at the minimum sentence and enhance within the range, raising and reducing within the range for enhancing and mitigating factors. In reviewing the issue of an excessive sentence the Court must conduct a de novo review of the Defendant's record, T.C.A. 40-35-401(d). The presumption of correctness is conditioned upon an affirmative finding that the trial court considered sentencing principles and all the relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, (Tenn. 1991). The enhancing factors that the Court found began with the Defendant's history of criminal behavior. The Defendant, eighteen (18) years of age at the time of this offense, had four (4) previous juvenile convictions the last of which resulted in the commitment of the Defendant to the Department of Youth Development. The Defendant also asserts that the second enhancing factor that the offense involved more than one victim, was improperly applied due to the separate convictions. However, there were some seventeen (17) individuals, including small children, in the house at the time of the shooting. The Defendant admitted that some shots were at random. This factor was therefore also properly applied.

Although the factor that personal injuries inflicted upon the victims were particularly great was improperly applied as conceded by all sides, it was harmless error to do so. The fourth enhancement factor cited by the trial court was that the Defendant employed a firearm during the commission of the felony. Certainly the circumstances and proof offered indicated a clear and appropriate use of the fourth enhancing factor. The fifth factor was that the felony resulted in death or bodily injury or involved the threat of death and bodily injury to people other than the victim. Certainly with seventeen (17) people present during the altercation this factor is also proper. The Court further found that the crime was committed under circumstances for which the potential for bodily injury to a victim was great. Because of the element of other individuals present, certainly this factor should also apply. State v. Robinson, No. 01C01-9209-CR-00270,

State v. Adams, 864 S.W.2d 31, (Tenn. 1993).

Additionally the trial court found applicable mitigating circumstances in that the Defendant acted under strong provocation and that because of the Defendant's young age, he lacked substantial judgement in committing the offense. (The State conceded that there should not have been enhancement based upon second degree murder for injuries inflicted upon the victim or for the death or bodily injury of a person other than the intended victim).

As is pointed out by the State, the record also establishes that the Defendant did not hesitate to commit a crime when the risk to human life was high and that factor could also be considered. The trial court properly weighed the applicable enhancing and mitigating factors and the record supports the sentencing in mid-range on the second degree murder conviction.

The next issue is whether the trial court erred in overruling the Defendant's objection to relevance in Jerome Eisom's testimony. The Defendant objected to the testimony of Jerome Eisom arguing that it was not relevant. Jerome Eisom testified that the Defendant had called him and told him to hide the gun, which fact the Defendant argues was of no consequence and should have been excluded. It is also urged that the probative value of such evidence was substantially outweighed by the prejudicial effect of that evidence. It is within the sound discretion of the trial court whether or not evidence is relevant or appropriate, and unless there is a clear showing that the trial court has abused its discretion that determination will not be reversed. State v. Evans, 838 S.W.2d 185 (Tenn. 1992). The defense argued that the Defendant acted in self-defense and that the testimony of the witness indicating that he wanted the gun hidden made it more probable than not that the Defendant did not act in self-defense. Testimony regarding the gun used was not objected to by the Defendant. The trial court's discretion was not abused and this issue is without merit.

The last issue presented by the Defendant is whether the evidence presented at trial was sufficient to support the verdict as to the victim James Currie. The Defendant argues that James Currie was the first individual to begin the fight which resulted in these charges and also was the individual who hit the Defendant in the face with a flashlight. He also asserts that the only testimony concerning the aggravated assault charge regarding Mr. Currie was Mr. Currie's testimony that the first shot was directed at himself. Thus the Defendant argues that the elements of the offense were not proven as to aggravated assault. The relevant question for the Appellate Court therefore, is whether after viewing the evidence in light most favorable to the prosecution,

any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). The jury verdict accredits the testimony of the State's witnesses and resolves all conflicts in favor of the State. State v. Williams, 657 S.W.2nd 405 (Tenn. 1983). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. The record would indicate that the Defendant pulled his gun and fired the first shot at James Currie, and that Mr. Currie then hit the Defendant in the face with the flashlight in order to be able to dive into the living room and out of the line of fire. The Defendant testified that he was trying to scare the individuals who were fighting with him.

A reasonable trier of fact may infer from the testimony involved, and all the circumstances in evidence, that James Currie feared imminent bodily injury from the Defendant and acted as a result of that fear. There is substantial evidence that the Defendant intentionally fired at James Currie causing him to fear such imminent bodily injury. This issue is also therefore without merit. Accordingly the judgment of the trial court is affirmed.

MARY BETH LEIBOWITZ, SPECIAL JUDGE

CONCUR BY:

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE